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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

RICHARD WELSH et al., Plaintiffs and Respondents, v. ANA RAMOS et al., Defendants and Appellants.	B223507 (Los Angeles County Super. Ct. No. EC047186)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michelle R. Rosenblatt and William D. Stewart, Judges. Affirmed.

David F. Mastan & Associates and Lindsay Joachim for Plaintiffs and Appellants.

Law Office of Jeffrey A. Zuidema and Jeffrey A. Zuidema for Defendants and Respondents.

A jury returned special verdicts in favor of Richard and Marlene Welsh in a personal injury action against Ana and Edwin Ramos.[1] Plaintiffs were awarded their costs as the prevailing party. On appeal, defendants contend plaintiffs were not entitled to recover their costs. We disagree and affirm.

FACTS AND PROCEDURAL BACKGROUND

On July 21, 2006, Ana Ramos rear-ended Richard and Marlene Welshes' Nissan Titan in front of Glendale Memorial Hospital. In the Welshes' car were Richard, Marlene and their then-18-month old son, Matthew. The Welshes sued Ana and her husband, Edwin, on May 14, 2008, for damages and injuries sustained from the accident. On February 12, 2009, defendants offered Marlene $7,500 under Code of Civil Procedure section 998[2] to settle her claim against them. That offer was rejected, as was defendants' settlement offer to Richard.

The matter was tried to a jury on October 6, 2009. On October 8, 2009, the jury returned special verdicts awarding $22,121 to Richard, $3,721 to Marlene, and $435 to Matthew. Marlene's damages award was comprised of: $320 for loss of ability to provide household services, $2,901 for medical expenses and $500 for pain and suffering. Richard's award was comprised of: $14,000 for lost earnings, $3,190 for medical expenses, $4,431 for diminution of value of the vehicle or property damage, whichever was less, and $500 for pain and suffering.

A proposed judgment was signed by the trial court on October 28, 2009. After consideration of defendants' objections to the judgment, it was set aside the next day and the trial court issued an order noting that the parties "stipulated, and the jury was informed, that rather than list the damage to the vehicle of Marlene Welsh and Richard Welsh on both Plaintiffs' verdict forms, which could result in a double recovery, that the diminution of value/property damage to the vehicle would only be set forth on Richard

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[1] For convenience, we will refer to the parties individually by their first names and collectively as plaintiffs and defendants.

[2] All further section references will be to the Code of Civil Procedure unless otherwise specified.

Welsh's verdict form, with the understanding that the damage award would be due and owing to both Plaintiffs."

The court further noted, "[t]he Defendants request that the judgment include that the property damage has been paid. The Court is unaware if there was an agreement between the parties prior to trial with respect to the property damage judgment. Absent a stipulation between the parties or a ruling of the Court, the fact that the property damage judgment has already been paid will not be reflected in the judgment itself. The parties should meet and confer as to a written acknowledgment that this portion of the judgment has been paid so as to avoid any ambiguity." The trial court ordered the judgment to be revised to reflect that the property damage award and the damages award to Matthew was to be jointly due to Marlene and Richard.

A final judgment was entered on December 7, 2009. In addition to the previously noted awards in favor of plaintiffs, the final judgment showed that *Marlene and Richard Welsh both recovered Joint Damages of* "*$435 (re Mathew Welsh)*" plus "*$4,431.00 (property damage).*" (Italics added.) The judgment awarded plaintiffs $4,092 in costs as the prevailing parties under section 1032.

Thereafter, defendants filed an objection to the judgment and moved to set it aside. The parties also each filed a memorandum of costs—defendants for $4,092 and plaintiffs for $2,314—and a motion to strike the other's memorandum of costs. The trial court overruled defendants' objections and denied their motion to set aside the judgment. The court further denied defendants' motion to tax costs and granted the Welsh's motion to recover their costs. A notice of appeal was timely filed.

DISCUSSION

Defendants claim the trial court improperly considered the jury's award of Joint Damages when it determined that the total amount of the jury's award to Marlene Welsh exceeded the defendant's offer to compromise. (§ 998.)[3] The trial court found the "express language in the October 29, 2009 minute order shows that the [Joint Damages] award of $435 for care provided to Matthew Welsh and the award of $4,431 for diminution of value in the vehicle are due and owing to both Plaintiffs. Since they are due and owing to both Plaintiffs, Marlene Welsh has the right to collect the full amount. Thus, her total award was $8,587 based upon the jury award of $3,721 [$320 for loss of ability to provide household services, $2,901 for medical expenses and $500 for pain and suffering] and the full amount of $435 and $4,431. [¶] The award of $8,587 to Marlene Welsh exceeds the Defendants' offer to settle for $7,500. Since Marlene Welsh obtained an award in excess of the settlement offer, the provisions of CCP section 998 regarding postoffer costs do not apply." The trial court also attributed the full amount of the Joint Damages to Richard's recovery, bringing his total award to $26,987.

Defendants contend that the property damages award should not have been included in the judgment because their insurer reimbursed the plaintiffs' insurer for that amount in 2006. As a result, plaintiffs' damage awards were less than what the trial court deemed them to be. This, defendants contend, impacts the judgment in two ways. First, Marlene's total damages award, without the $4,431.13 property damage, would be less than the pre-trial settlement offer and as a result, would have triggered the cost-shifting provision under section 998. Second, Richard's damages award, without the $4,431.13, would not have exceeded the jurisdictional minimum of $25,000, prohibiting the trial court from awarding plaintiff costs under section 1033. We disagree.

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[3] Defendants argue that plaintiffs failed to present admissible evidence that the value of their vehicle was diminished. However, the special verdict form expressly asked the jury to award damages for "diminution of value of the vehicle or property damage to the vehicle, whichever is less[.]" We need not scour the record to determine whether evidence of diminution of value was admitted at trial since it is undisputed that evidence of property damage to the vehicle was properly presented to the jury.

I. Recovery of Costs Under Section 998 of the Code of Civil Procedure

Defendants contend that Marlene's total damages award should not include the $4,431.13 property damage award because the offer was made after the property damage had been settled and paid by their insurer. As a result, their section 998 offer for $7,500 did not contemplate any property damages and "was made to settle the remaining issues in the case, namely medical specials and potential general damages." Since the jury award for Marlene's damages totaled $3,721, excluding any property damage, defendants argue that Marlene was not entitled to her costs and should instead be required to pay their post-offer costs under section 998. We decline to adopt defendants' view of the proceedings.

There is no indication that the section 998 offer to Marlene was limited to settlement of all damages *except* for the property damage to the Titan. Instead, the section 998 offer specified that it was for "Release of All Claims by plaintiff MARLENE LOPEZ WELSH[,]" and the complaint specifically included a property damage claim. Moreover, defendants failed to allege the affirmative defense of offset in any of their pleadings and did not make the argument until after trial. Neither did they attempt to obtain an order that would amend the judgment to exclude property damages. Defendants also had the option, but failed, to follow the procedures outlined in sections 724.110 and 724.120[4] to obtain an order acknowledging partial satisfaction of the

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[4] Section 724.110 provides in relevant part that, "[t]he judgment debtor . . . may serve on the judgment creditor a demand in writing that the judgment creditor execute, acknowledge, and deliver an acknowledgment of partial satisfaction of judgment. . . . [¶] If the judgment creditor does not comply with the demand within the time allowed, the judgment debtor or the owner of the real or personal property subject to a judgment lien created under the judgment may apply to the court on noticed motion for an order requiring the judgment creditor to comply with the demand. . . . If the court determines that the judgment has been partially satisfied and that the judgment creditor has not complied with the demand, the court shall make an order determining the amount of the partial satisfaction and may make an order requiring the judgment creditor to comply with the demand."

Section 724.120 specifies the information to be contained in the acknowledgment of partial satisfaction of judgment.

judgment. Defendants cite to a cancelled check made out to "Farmers Insurance as subrogee for Marlene Lopez" in the amount of $4,433.31 which *appeared for the first time* appended to a motion to correct the judgment. There is no indication that this document was received into evidence by the trial court or is even admissible. Defendants' argument does not form a sound basis on which to overturn the trial court's ruling.

Given our conclusion, we affirm the trial courts order awarding her costs.

II. Recovery of Richard Welsh's Costs

Defendants next contend the trial court erred in granting Richard Welsh's costs because he failed to obtain a judgment in excess of the $25,000 jurisdictional minimum. Defendants ignore the fact that an award of costs is discretionary in this case and that the trial court indicated it would have exercised its discretion in favor of the plaintiff's request for costs even if the jurisdictional minimum were not realized. Accordingly, we affirm the trial court's order in this regard as well.

As a general rule, the prevailing party in an action is entitled to recover his costs. (§ 1032, subd. (b).) However, the trial court has discretion to deny costs to a plaintiff who brings an action in the superior court when it should more properly have been brought in a limited jurisdiction court. (§ 1033, subd. (a).) Therefore, if a plaintiff brings an action in superior court and recovers a judgment less than the $25,000 jurisdictional limit for a limited civil case, the trial court may deny costs to the plaintiff, even if he is the prevailing party. (*Ibid.*)

The trial court granted Richard Welsh's costs believing that the amount exceeded the jurisdictional minimum of $25,000. However, when it denied defendants' request to strike plaintiffs' memorandum of costs, the trial court reasoned that "even if the award were less than $25,000, the Defendants offer no argument showing that the Court should exercise its discretion and reduce the Plaintiffs' request for $2,314 in costs. The Defendants do not analyze any particular cost and show that the Court should refuse to award the cost because it would not have been incurred in a limited jurisdiction case. [¶] Further, the Defendants fail to show that the Court should exercise its discretion because

this case should have been brought as a limited jurisdiction case. Plaintiffs' opposition includes argument that Richard Welsh claimed lost wages of $33,773.14, medical expenses of $6,456, property damage of $4,433.31, and rental care [*sic*] expenses of $1,316.31. Since these claims of damages are in excess of $25,000, it does not appear that the Plaintiffs acted in bad faith by filing this as an unlimited jurisdiction matter."

We review the trial court's award of costs under section 1033, subdivision (a) for abuse of discretion. (*Steele v. Jensen Instrument Co.* (1997) 59 Cal.App.4th 326, 331.) " ' "Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice[,] a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." [Citation.]' " (*Dorman v. DWLC Corp*. (1995) 35 Cal.App.4th 1808, 1815.) We find no abuse of discretion in the trial court's ruling. (*Id.* at p. 1816.)

DISPOSITION

The judgment is affirmed.[5] The Welshes are awarded costs on appeal.

BIGELOW, P. J.

We concur:

FLIER, J.

GRIMES, J.

[5] It is unclear how the trial court arrived at the $4,092 cost award to plaintiffs when their memorandum of costs clearly shows a request for $2,314. Defendants are the ones who sought $4,092 in costs. Neither party addressed this issue and we therefore consider it waived.